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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 224

JOHN A. GAUTIER, Tax Assessor, EARNEST OVERSTREET, Tax Collector, and RAY E. GREEN, Comptroller of the State of Florida,

Petitioners,

v.

FLORIDA GREENHEART CORPORATION, a Florida corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

Respondent, Florida Greenheart Corporation, instituted this action in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, on September 1, 1960, for a decree declaring null and void an assessment made by Petitioners' predecessors in office of a personal property tax on imports known as Demerara Greenheart (a type of timber grown exclusively in British Guiana and because of its unique quality is used for pilings and piers), on the grounds that the said tax as levied on Respondent's

imports violated Article I, Section 10, Clause 2 of the Constitution of the United States of America. Plaintiff further sought a permanent injunction restraining the defendants and their successor and successors in office from enforcing or attempting to enforce the collection of said taxes predicated upon such assessment (R. 1-5).

Defendant filed an answer to the complaint denying all of its material allegations and contending affirmatively, among other things, that plaintiff had failed to exhaust its administrative remedies as provided by the statutes and laws of the State of Florida. A dismissal of the complaint was sought (R. 9-11). Plaintiff moved for judgment on the affidavits of J. E. Jacks, its president, with exhibits annexed thereto (R. 12-30). A hearing was held before Circuit Judge Joe Eaton. The sole testimony offered was Mr. Jacks' deposition taken pursuant to agreement of the parties (R. 31-60) and submitted to the Court. The Circuit Judge denied the application and dismissed the complaint with prejudice on October 3, 1963 (R. 63-66).

From the final decree entered thereon plaintiff appealed directly to the Supreme Court of Florida pursuant to Article V of the Florida Constitution by reason of the fact that the sole question involved the application of Article I, Section 10, Clause 2 of the Constitution of the United States (R. 61-62).

On March 3, 1965, that Court handed down its opinion, in writing, reversing the decree of the Circuit Court of Dade County, aforesaid, and remanding the proceedings to the Court of First Instance to enter a decree in accordance with the prayed for relief contained in the complaint. Chief Justice Drew of the Supreme Court of Florida wrote the prevailing opinion (Petitioner's Appendix; A. 1-7), which was concurred in by four justices of that court, to wit, Honorables Thornal, O'Connel, Caldwell and Hobson. Mr. Justice Ervin dissented. His opinion appears in Petitioners' Appendix (A. 7-14) in which Mr. Justice

Roberts concurred. An application for rehearing was denied (A. 15).

Petitioners now pray that a writ of certiorari issue to review the judgment entered thereon upon the mandate of the Supreme Court of Florida.

Citations to Opinion Below

The opinion of the Circuit Court of Dade County, Florida, is reported in 20 Fla., Supp. 115. The opinions of the Supreme Court of Florida are reported in 172 So. 2d 589.

Question Presented

Was the imposition of a personal property tax by the County Assessor of Dade County, on Demerara Greenheart log pilings and timber imported from British Guiana for the exclusive purpose of sale which, due to the size and shape thereof, are impossible of packaging and are shipped by boat as individual pieces and stored in importer's yard to meet existing orders according to description, or anticipated orders, no piece of Greenheart being altered as to form, substance or character by the importer before sale, or mixed with any other property except individual pieces of Demerara Greenheart previously imported, unconstitutional, as prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States.

Statutes Involved

The sole statute involved is Article I, Section 10, Clause 2 of the Constitution of the United States.

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports . . . except what may be absolutely necessary for executing its inspection Laws . . ."

Reasons for Denying the Writ

1. The Decision Below Has Very Limited Application. Its Alleged Effect Has Been Grossly Exaggerated.

The issue arises because of the nature of the import. Its massive size and shape prohibits packaging in the ordinary sense of the word. The applicable law is well established. Courts have held that imports remain exempt from local taxation until one of three specific conditions occur (a) they are sold by the importer; (b) the importer changes the original form or breaks the original package; (c) the items are imported for the sole use of the importer. Not one of these contingencies has occurred. The law was conclusively established by Chief Justice Marshal in *Brown* v. *Maryland,* 25 U. S. 419, 12 Wheat. 419, 6 L. Ed. 678 (1827). The doctrine thus laid down has been considered by this Court on numerous occasions. *Hooven & Allison Co.* v. *Evatt, Tax Commissioner of Ohio,* 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 1252, rehearing denied 325 U. S. 892, 65 S. Ct. 1198, 89 L. Ed. 2004 (1944); *Low* v. *Austin,* 13 Wall. 29, 80 U. S. 29, 20 L. Ed. 517 (1871). Where massive logs incapable of packaging are shipped loose on a vessel and stored in identical form until sold by the importer they are clearly exempt from taxation.

2. The Decision Below Is Correct.

Petitioners appear to suggest the somewhat curious argument that the vessel which transported the pilings from British Guiana was the original package, although there is not the slightest authority to support that argument. Petitioners place their principal, if not sole reliance upon a California case, to wit, *E. J. Stanton & Sons* v. *Los Angeles County* (2nd DCA 2nd Div. 1947), 78 Cal. App. 2d 181, 177 P. 2d 804, certiorari denied 332 U. S. 766, 68 S. Ct. 75, 92 L. Ed. 352 (1947). Petitioners' attempt to state that the *Stanton* decision is supported by *Brown* v. *Maryland*

(*supra*) and *F. May & Company* v. *City of New Orleans*, 178 U. S. 496, 20 S. Ct. 976, 44 L. Ed. 1165 (1900), is specious. In *Brown* v. *Maryland* (*supra*), the original package of the importer was not broken; in the latter action the packages were broken and the imports lost their character. *Hinson* v. *Lott*, 8 Wall. 148, 75 U. S. 148, 19 L. Ed. 387 (1869), cited Petitioners' brief, page 9, did not involve an interpretation or construction of Article I, Section 10, Clause 2 of the Constitution but rather the Interstate Commerce Clause. The distinction was made clear by this Court in *Austin* v. *Tennessee*, 179 U. S. 343, 21 S. Ct. 132, 45 L. Ed. 224 (1900) and *American Steel and Pile Company* v. *Speed*, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 539 (1904). Certainly, this Court's refusal to grant certiorari in the *Stanton* case may not be deemed an acceptance or a ratification of any dicta therein contained. *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 70 S. Ct. 252, 94 L. Ed. 562 (1950).

The authorities are clear that when an import is not subject to packaging, as at bar, to change its status from an import requires either a change in form such as a physical commingling with domestic products or a sale. *Anglo-Chilean Nitrate Sales Corp.* v. *State of Alabama*, 288 U. S. 218, 53 S. Ct. 373, 77 L. Ed. 710 (1933); *Mexico Petroleum Corp.* v. *Louisiana Tax Commission*, 138 So. 117, 173 La. 603 (1931); *Re Taxes, Pacific Guano and Fertilizer Co.*, 32 Hawaii 431, 440, 441 (1932); *City of Galveston* v. *Mexican Petroleum Corporation*, 15 F. (2d) 208 (1926).

Conclusion

The incontrovertible facts are:

1. Respondent's sole business is the import of Demerara Greenheart pilings and timber for sale in connection with the construction of piers.

2. The original package constitutes the individual logs in the manner and form in which they are shipped from British Guiana.

3. The imports are not changed in form nor commingled with any items other than similar imports.

4. Each piece of piling and timber is separately marked, stamped, identified and certified by officials of British Guiana and is imported solely and exclusively for sale, with duty thereon paid by Respondent.

No serious question of broad national significance exists.

Patently the Supreme Court of Florida followed accepted, recognized authorities in holding that the attempt of the County Assessor of Dade County to assess a personal property tax on the imports violated the quoted Article of the Constitution of the United States.

WHEREFORE, Respondent prays that this petition be denied and that a writ of certiorari be refused.

Respectfully submitted,

RICHARD STEEL,
Counsel for Florida Greenheart Corporation.

August 4, 1965.